NO. 80-1213

FILED

APR 9 1981

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EILEEN ELDORADO JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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STATUTES AND RULES

Code of Virginia, 1950:	
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I

The Relative Importance Of The Issues

The petitioner argues that the government's rebuttal evidence violated Fed. R. Evid 404(b) because (and only because) the majority below held, as its sole basis for affirmance, that Pemberton's testimony was admissible under that rule. The opinion's distortion of the rule is patently grievous; particularly where, to

avoid rejecting evidence insinuating other crimes, wrongs or acts of dishonesty, the court unrealistically held that such evidence does not show character or a trait of character but shows "state of mind" or "culpability of mind". Of even greater fundamental importance, however, are the blind eye and deaf ear which the court below turned to the petitioner's assertion of her right not to be deprived of liberty or property without due process of law.

The paramount question in this case is whether this Court will countenance the government's deliberate preparation and presentation of inadmissible testimony which was clearly intended to destroy the impartiality of the jury by "trying" the petitioner for a crime not charged in the indictment, and by doing so without

confronting the petitioner with the witnesses against her.

II

The Government Had No Lawful Justification For Calling Its Rebuttal Witness

In the trial court, the purpose for the rebuttal testimony was stated viz:

> "We intend to use Mr. Pemberton as a character witness. They have introduced character testimony and we are entitled to come back and rebut it." (V-T234-5).

Unquestionably, the government was entitled to contradict, if it could, the testimonies of the seven witnesses who had shown the petitioner's good general reputation as a truthful and law abiding citizen. Had none of these witnesses testified, the government would not have had a pretense for calling Mr. Pemberton. Fed. R. Evid. 404(a)(1). Nevertheless,

the attorneys for the government called their so-called rebuttal character witness, knowing full well that he could say nothing contrary to what had been said concerning the petitioner's general reputation.

Here, the government adopts the "state of mind" concept which the majority below has ingeniously grafted on to the "other purposes" aspect of Fed. R. Evid. 404(b); and it suggests, as a precedent, United States v. Jacobson, 578 F.2d 863, 866-867 (10th Cir.), cert. denied, 439 U.S. 932 (1978). In that case, however, the government's rebuttal witness, Koch, was called not to off-set a showing of good general reputation, but to directly contradict the defendant's denial of involvement in the amphetamine traffic. Having been one of the defendant's partners in the illegal drug business and in the

automobile sales business as well, Koch was a competent witness to prove that the defendant had lied when he denied having ever traded in illegal drugs. Such evidence of another crime not charged in the indictment was clearly admissible under the "other purposes" aspect of Fed. R. Evid. 404(b). "The trial court correctly instructed the jury that the evidence was to be considered only as it related to intent, plan, knowledge, identity or absence of mistate or accident * * * [and] added that the defendant was not to be tried or convicted of any crime not charged in the indictment." (578 F.2d at 866-867; emphasis added.)

On direct exmination, the petitioner had said that she never prepared a tax return; that when her returns had been prepared, she signed without studying them; and that had she known they were

inaccurate, she would not have signed them. On cross-examination, she disclaimed knowledge of the amount of her gross receipts or of the accuracy or inaccuracy of the government agent's calculations of her total receipts or investments. She testified in detail as to the business procedures of her office and as to her participation and the participation of her employee in assembling the data from which her tax returns were prepared. The attorneys for the government knew that Mr. Pemberton could not contradict anything to which the petitioner had testified. Before they arranged for Pemberton's presence at the trial, they knew (as it became apparent to defense counsel before Pemberton had answered eight introductory questions) that his testimony could not possibly be rebuttal of anything.

III

The Government's Deliberate Frustration Of Petitioner's Constitutional Protection Is Not Offset By The Unfounded Suggestions Of Perjury

To justify the result below, the majority interpreted the petitioner's testimony as maintaining that "she had had nothing to do with preparing her tax returns" (Pet. App. 2a). Here, the government sounds the same note in its summary of the petitioner's testimony--"that her returns were prepared by others and that she simply signed them without studying them" (Memo for U.S., 2). A suggestion that the petitioner had perjuriously disavowed all personal participation in the preparation of her returns is most powerfully made by the government on page 5 of its Memorandum where it cites the testimony of petitioner's employee, "corroborated by the petitioner's handwritten

notations", to show that petitioner was intimately involved in the preparation of the summaries from which her tax returns were prepared.

The petitioner's involvement in the preparation of such summaries is accurately reflected in the second paragraph of her Statement of Facts (Pet., 5) where a pertinent sentence from her testimony is quoted, viz: "When it was time to prepare the income return Mrs. Allar kept the figures and we prepared it [the summary] together and she would tell me what headings to put, and that's how it was done at the last minute".

Petitioner's testimony shows that she does not know how to use the adding machine in the office (V-T129); that from the log and from the book for the Medicare, Medicaid and Blue Cross and Blue Shield accounts, Mrs. Allar would add up

the receipts "and put it on little bits of paper" or, sometimes, call it off to the petitioner (V-T127-128). Together they went through the petitioner's check-book to figure out deductions (V-T155-156) which they would schedule, using the for-mat which petitioner's brother had used, the headings being written sometimes by the petitioner and sometimes by Mrs. Allar. (V-T154). After Mrs. Allar had prepared a rough draft of a given summary, the pe-titioner made adjustments and changes, deleting items which should not have been included and adding items which should not have been left off. (V-T156-157). Nowhere can we find that the petitioner ever denied her involvement in the preparation of the tax summaries as is inferred on pages 2 and 6 of the Memorandum in Opposition.

The Solicitor-General's preoccupation with Pemberton's testimony has led him

to conclude, contrary to fact, that the petitioner denied having had any part "in the preparation of the summaries that were given to petitioner's accountant to serve as the basis for preparation of her tax returns" (Memo for U.S., 6). This demonstrates the virtual certainty that Pemberton's testimony had the very substantial effect on the jury's verdict that the government's trial attorneys intended it to have. Moreover, the errors in offering and in admitting this testimony have constitutional dimension and, hence, the effect on the jury's verdict would be entirely beside the point.

IV

The Government's Deliberate Frustration Of Petitioner's Constitutional Protections Is Not Offset By Suggestions Of Waiver By Counsel

A

The government argues that petitioner's trial counsel, Mr. Rosenberger, "waived

any challenge petitioner might have been entitled to raise concerning the admission of evidence, absent plain error affecting substantial rights" (Memo for U.S., 5). In support of its claim that some or all of the spontaneous utterances of trial counsel constituted waiver, the government cites Lawn v. United States, 355 U.S. 339 (1958); United States v. Elmore, 423 F.2d 775, 777 (4th Cir.), cert. denied 400 U.S. 825 (1970); and United States v. Fowler, 608 F.2d 2, 8 (D.C. Cir. 1979) as it cites United States v. Jamerson, 549 F.2d 1263, 1267 (9th Cir. 1977).

In Lawn, both the opinion of the Court and the concurring and dissenting opinion vividly reflect the Court's unanimous concern that there must be a conscious and intentional waiver of objection to evidence which bears a taint of unconstitutionality. In United States v. Elmore,

the Fourth Circuit found that the challenged notebook was not the defendant's property wherefore its use did not violate any constitutional stricture and, further, that a conscious and knowing relinquishment of any right to have the notebook suppressed was evidenced by the defense counsel's affirmative statement that he did not object to the use of the notebook which, in a pre-trial proceeding, the court had indicated he would"probably" admit into evidence.

To the extent that United States v. Jamerson is cited and followed in United States v. Fowler, no constitutional problem attended the hearsay testimony concerning the defendant's attempt to cross the Canadian border. And no taint of unconstitutionality attended the evidence in the Fowler case concerning the financial condition of the defendant Gibson.

After quoting from the Jamerson holding:

> "If testimony, even though improper, is introduced into evidence without objection, it becomes part of the record and is available to be considered for its probative value by the trier of fact",

the Fowler court added this caveat:

> "Courts will make an exception to this rule 'only if the admission of the testimony constituted plain error affecting substantial rights'" (608 F.2d at 8).

If, as petitioner contends, the admission of Pemberton's testimony violated her Sixth Amendment rights, such testimony could not have been "available to be considered for its probative value" unless the petitioner herself had knowingly and intelligently waived the protection of the Amendment.

B

Putting aside, for the moment, the plainness of the error and the substantiality of the rights thereby affected, we

look at the record of everything said by petitioner's trial counsel, Mr. Rosenberger, while the government's rebuttal witness was under direct examination:

> "MR. ROSENBERGER: We object to this general policy of study by HEW. It's not rebuttal of anything. It couldn't possibly be.
>
> * * *
>
> "MR. ROSENBERGER: He says it is rebuttal testimony, and he can ask him directly what it is [V-T234]
>
> * * *
>
> "MR. ROSENBERGER: I have no objection to your asking the direct question
>
> * * *
>
> "MR. ROSENBERGER: I object to 'our review'. I have no objection to this witness testifying to what he knows.
>
> "THE COURT: Or what his investigation revealed.
>
> "MR. ROSENBERGER: Yes, I have no objection to what he knows at all. [V-T235]

* * *

"MR. ROSENBERGER: OK. Just say what you did.

* * *

"MR. ROSENBERGER: Excuse me, your Honor. I would like to know when it [a review of Dr. Johnson's medical services for the period covering through March of 1979] started, to see if it has anything to do with the period under investigation.

"THE COURT: I think once you put the character in issue, then the Government would have the right to bring out specific instances, and so we're talking about her character and all at the present time, I assume.

"MR. ROSENBERGER: I have no objections to that. I just wanted to know what period it covered. [V-T236]

* * *

"MR. ROSENBERGER: Your Honor, please. I object to his recommendations. I have no objection to his saying what he found. Not at all. [V-T237]".

Counsel's first objection was that the HEW "studies to determine potentials for

fraud in the Medicaid programs" couldn't possibly be rebuttal of anything. He had no objection to "the direct question", i.e. to a question phrased to elicit the general reputation for peace and good order or for truth and veracity. From this position he had retreated but slightly, before the court gratuitously ruled that the government would have the right to bring out specific instances. Taking his cue from the court's ruling and having answered the court's next question: "What period of time are you talking about?", the government's agent hastily volunteered testimony insinuating other crimes, wrongs, and acts of dishonesty. Doubtless, the subsequent remarks of petitioner's trial counsel, which the government now argues constituted waiver, were his effort to avoid projecting to the jury a purpose on his part to keep facts from them.

C

To whatever extent the government may properly argue that petitioner's trial counsel effected a waiver of her right to challenge Pemberton's testimony, to that extent it would follow that she was without "the [effective] assistance of [competent] counsel for [her] defense", which the Sixth Amendment requires in all criminal prosecutions. Petitioner's due process right was violated not by the fault of her counsel, but by the government's contrivance to taint her trial with testimony it knew to be forbidden by Fed. R. Evid. 404(b) and by the Constitution.

CONCLUSION

To minimize the importance of this case, the government suggests that the petitioner was merely fined and placed on probation (Memo for U.S., 1-2). In fact, the peitioner was convicted of a felony;

imposition of sentence being suspended. By virtue of §54-317(9) as incorporated in §54-316(3) of the Code of Virginia, 1950, as amended, such felony conviction constitutes sufficient evidence of immoral or unprofessional conduct to warrant revocation of the petitioner's certificate or license to practice medicine.

The severity or leniency of the penalty has no bearing on the basic question in, or on the importance of, this case. The commands of the Constitution, and those of the Federal Rules of Evidence as well, peculiarly enjoin attorneys for the government, as well as the courts, that no one should be deprived of life, liberty, good name and reputation, or property, except in accordance with the law of the land.

Respectfully submitted,

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9th April, 1981